UNITED STATES
CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

CANTON INSURANCE OFFICE, LIMITED, a corporation, THE YANG-TSZE INSURANCE ASSOCIATION, a corporation,
Appellants,

vs.

INDEPENDENT TRANSPORTATION COMPANY, a corporation, THE CHINA TRADERS INSURANCE COMPANY, a corporation,
Appellees.

No. .....

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division

BRIEF FOR APPELLEE

KERR & McCORD,

3109-16 Hoge Building
Seattle, Wash.

IRA A. CAMPBELL,

Merchants Ex. Building
San Francisco

Proctors for Appellee.

This cause comes to this court on appeal from the District Court of Washington, for review of a decree of that court against the appellants, Canton Insurance Office, Limited, for the sum of $6603.73, and against the Yang-Tsze Insurance Association for the sum of $4952.80; the judgment against the China Traders Insurance Company in the sum of $3308.86 having been paid.

The action is in admiralty on policies of insurance issued to the appellee, Independent Transportation Company, July 3rd, 1907, covering its steamer Vashon, then engaged in the summer trade between the City of Seattle and a summer resort at Alki Point, located about six miles south of said city. The policies were San Francisco Hull Time Policies, containing the usual clauses.

FACTS.

1. Appellee, Independent Transportation Company, is a corporation duly organized and existing under the laws of the State of Washington, and at all times in the libel mentioned was the sole owner of the steamer Vashon. (Ex. A, Ev. of Hamilton p. 30.)

2. Appellants are each insurance corporations duly organized and existing with authority to transact business within the State of Washington.

3. On July 3rd, 1907, for a valuable consideration, the appellants, respectively, issued to the appellee, their time policies of insurance covering the vessel for one year from July 3rd, 1907, to July 3rd, 1908, said policies being for the sum of $4000 and $3000, respectively.

4. Each of these policies insured appellee upon its interest as owner on the body, machinery, tackle, apparel and other furniture of said steamer Vashon, against the perils of the sea, etc; "and all other losses and misfortunes that shall come to the Vashon or damage to the said vessel insured, or any part thereof, to which insurers are liable by the rules of insurance in San Francisco, including the rules and adjustment of losses printed on the back of such policies, and the provisions of the Civil Code of California," etc.

The policies further provided in case of any loss or misfortune resulting from any peril insured against, the party insured should sue, labor and travel, etc.

Each policy contained this further provision, "Vessels warranted employed in the general pas-

senger and freight business on Puget Sound within a radius of thirty miles from Seattle." (Exhibits F, G, H.)

5. At the time these policies were written the Vashon was known to the appellants to be engaged in carrying passengers from Seattle to Alki Point, a summer resort, and a suburb of Seattle, about six miles south and across Elliott Bay, from the City of Seattle.

6. In August, 1907, the steamer Vashon discontinued her summer run to Alki Point and was moored until about December at the King Street Dock in the City of Seattle in Elliott Bay. (Testimony Hamilton 61-62.)

7. About the first of December, 1907, the Vashon was removed from King Street Dock and securely moored near the mouth of the Duwamish River, a tributary of Elliott Bay and within the tidal waters of Puget Sound.

(See libellants' Exhibit E, Testimony Hamilton 63, Capt. Warner 95, 97, 98.)

8. On December 15th, 1907, the steamer Vashon sunk at her moorings.

9. On December 16th, 1907, her owner notified Captain Stephen B. Gibbs, Surveyor for the San

Francisco Board of Marine Underwriters of the mishap to the steamer and employed Frank Walker, a marine surveyor, to represent it. On the afternoon of the 16th of December, 1907, Messrs. Gibbs and Walker visited the scene of the accident where they made a partial survey and reported (Libellants' Exhibit C):

> "Upon making a careful examination at low water we found the vessel to be laying with her head to the East and on the north bank of the river, the saloon deck being awash on the port side forward, the starboard side of the stern the wheel and the starboard rudder were resting heavily on the bank; at high water a part of the pilot house and the after starboard side of boat deck were the only parts of vessel unsubmerged."
>
> "We recommend that a diver be employed to examine the bottom of river and bottom of vessel, that all openings be made tight, and that four sets of dolphins be driven and capped, one set on each bow and one set on each quarter, that heavy cables be passed under vessel and led to purchases rigged at the head of each set of dolphins, that the necessary scows, pile drivers and tugs be employed and when all preparations were complete, the necessary pumps be placed in position and upon her main deck line being raised to the surface of the water, the hull be pumped out."

The surveyors' report continues:

> "The above recommendations were carried out and on January 11th, 1908, the vessel was floated and moored to the dolphins by which she was raised."

> "Upon making a further examination after floating, we found her in such a filthy condition with fuel oil and river mud that it was impossible to ascertain the extent of damages, therefore we recommend that arrangements be made to haul the vessel out of the water, remove two strakes of planking, from her bottom and thoroughly wash out all loose dirt to enable us to make a survey in detail."

10. Thereupon the appellee proceeded at once to carry out the recommendations of the surveyors. The vessel was raised and moored January 11th, 1908, by Captain Genero and Mr. Finch with great difficulty (testimony Gibbs 36, 37; Walker 83-85) at an expense of $3964.80. (Transcript 70.) This work "was carried on with all the diligence possible" (Ev. Capt. Gibbs, Rec. 37; Hamilton 67, Walker 65, 85). The surveyors proceeded at once to effect arrangements to haul out and dock the vessel, and after interviewing several parties, let a contract to Sloan Bros. to haul her out (Ev. Gibbs 38, Walker 83). "It took Sloan a long time to lay his ways and get ready. He carried away a great deal of his gear in trying to pull her out. He went to work in the wrong way" (Ev. Gibbs 38, Hamilton 67). "Sloan was competent." "He got her only partly out of the water." "We were urging him to make haste." "He did not get the vessel out of the water and ready for survey until April 15th,

1908." "We endeavored to make a survey when the vessel was partly out, but it was unsafe to do so." (Ev. Gibbs 48, Walker 65). The owners were not responsible for any of this delay." (Ev. Gibbs 41, Walker 86, Hamilton 67.) The expenses incurred in raising, hauling out and cleansing the vessel was $3964.80. (Rec. 70.)

11. On April 15th, 1908, the final survey was made. (Ex. C.) The report proceeded:

> "Vessel was towed to Messrs. Sloan Bros. shipyard, where she was hauled out and cleaned, and upon making a careful examination of the vessel we found the damage to be very extensive and hereby recommend that in the event of the vessel being repaired, said repairs be made as per attached specifications."

12. Captain Gibbs thereupon negotiated for bids for the repair of the vessel. Upon April 16th, the day the survey was completed Hall Bros. Marine Railway and Shipbuilding Company submitted a bid for $23,500, the work to be completed in sixty days (see Ex. G), and on April 27th, 1908, Heffernan Engine Works submitted a bid for repair work at $14,027, time required *four* months. (See Ex. F.)

13. Immediately on the receipt of the report of the surveyors and on April 15th, 1908, appellee gave notice of abandonment both by wire and in writing to each of the appellants (Libellants' Ex-

hibit L) and on April 17th, 1908, furnished complete proofs of loss as required by the policies (Ev. Lowe 111, Ex. 3).

14. Captain Gibbs, surveyor for the Underwriters, sold the vessel for $750, which was her full value in her damaged condition (Ev. Gibbs 51). Her sound value was $15,000.

15. It is customary for marine underwriters on the Pacific Coast to hold vessels covered by San Francisco form of hull time policy while laid up, in the absence of a provision in the policy for the return of the premium.

Witnesses for Appellee:

Witnesses for Appellants:

ARGUMENT.

In the trial court proctor for appellant discussed four questions:

1. Had libellant an insurable interest at the time of loss?

2. Warranty as to time.

3. Was the abandonment timely?

4. Was the loss total?

The first question has been eliminated by stipulation.

SCOPE OF WARRANTY.

Appellant will contend that the words written into a time policy: "Warranted employed in general freighting and passenger business within a radius of 30 miles of Seattle" *mean "Warranted to be continuously so employed".*

> "The rule that contracts of insurance must be liberally construed in favor of the insured does not authorize the court to put into an insurance contract words that would make a radical change in its meaning, or that would

make for the parties a contract they did not themselves make."

N. W. Ins. Co. vs. Nesfus, 140 S. W. 1026.

Judge Hanford construed this warranty in 173 Fed. 564, upon exceptions to the libel and answered appellant's contention as follows:

> "The respondents contend for the principle that insurers are entitled to insist upon strict and literal compliance with special warranties, and deny the right of libellant to introduce parol evidence to explain or vary the terms of the warranty clauses. This argument recoils, for application of a rigorous rule defeats the purpose for which it has been invoked in these cases. Unless the rules of grammar shall be disregarded, or the phraseology of the warranty changed by a somewhat liberal construction, there is no apparent breach. It is not pretended that the record shows that the Vashon was not employed in the general passenger and freighting business on Puget Sound when the policy was issued. The word "employed" is a verb of the past or present tense, and cannot be accurately used potentially to indicate future action, unless qualified by additional words not found in these warranty clauses. The argument for the respondents assumes that the warranties relate to future employment of the vessel during the life of the policies and that the clauses should be interpreted to read: 'Vessels warranted to be employed in the general passenger and freighting business on Puget Sound'. The interpolation of the words 'to be' would materially change the meaning of the clause, and it is not permissible to thus interpolate in order to change the meaning of a contract

> which courts are required to enforce strictly according to the terms assented to by the parties. Exception is overruled."

In *St. Nicholas Company vs. Merchants Investment Company,* 11 Hun. 108, the policy by its terms purported to cover the vessel "while running on the Hudson and East Rivers," but the court held that this language did not restrict the insurance to the time the vessel was in motion.

> "A warranty 'to sail with a convoy' requires that the vessel join and depart with a convoy from the customary place where convoys are to be had, and it is no breach of warranty that she does not continue with a convoy during the whole course of the voyage."

Manning vs. Gist, 3 Dougl. 74.

Harrington vs. Halheld, 2 Park Ins. 634.

Jeffrey vs. Lyender, 3 Lev. 32.

A statement in a policy "that a vessel is intended to navigate certain waters is not a warranty that she shall actually navigate them.

Grant vs. Aetna Ins. Co., 12 L. C. Rep. 386.

A warranty of neutrality "is merely that the property is neutral at the time the risk commences and not that it shall continue neutral throughout the adventure".

Colbreath vs. Gracy, 4 Fed. Cas. No. 2296.

"A stipulation in a policy on a boat that it shall be completely provided with 'Master, Officers and Crew' is not broken by placing the boat temporarily in charge of workmen for the purpose of repairs."

St. Louis Inv. Co. vs. Glasgow, 8 Mo. 713.

"The same rules of construction which apply to all other instruments apply equally to contracts of marine insurance. The intent of the parties is to be ascertained by construing the policy according to its sense and meaning as collected from the terms used in it, due effect being given to every part; and the terms are themselves to be understood in their plain, ordinary and popular sense, unless the context shows an intent to use them in some other special and peculiar sense. The contract is to have a liberal construction in favor of the insured, particularly as to limitations and exceptions where there is doubt or ambiguity."

26 *Cyc.* 279 and cases.

"The contract must be construed with relation to the general and established usages and conditions of a particular trade or business with reference to which the insurance has been effected, which usages and customs the insurer is bound to learn."

26 *Cyc.* 381 and cases.

This insurance was written on the steamer Vashon for one year, which vessel was then known to be engaged on her summer run.

Testimony was taken on behalf of both parties as to the meaning of the words "Warranted employed", and as to the customs under such policy by which she is deemed covered, no demand having been made for a return premium.

J. B. Levison, Vice-President of the Firemen's Fund Insurance Company, testified (Transcript 197-8) that under the Hull Time Policy the vessel was covered while laid up whether return premium is demanded or not.

To the same effect is the testimony of LaBoyteaux (page 194) Marine Adjuster with Johnson & Higgins.

To the same effect see testimony of Frank G. Taylor of Firemen's Fund, pp. 91, 93.

To the same effect see testimony of Gerald Lowe, Average Adjuster with Johnson & Higgins, page 111.

Appellants' witnesses testified as follows:

Louis Rosenthal construed the words "Vessel warranted employed" to mean that "the vessel from the inception of the policy and during its life must be employed in the general passenger and freighting business on Puget Sound."

Q. Are vessels usually or not usually held covered when laid up?

A. They are usually held covered, especially when they are laid up in customary and usual places. (See pp. 151-152.)

Harry Pinkham testified (pp. 153-4) that under the warranty the Vashon should "be confined to the trade as stated by the clause",—that the warranty "touches the employment of the vessel and restricts her trade to certain waters", but that under the S. F. Hull Time Policy, the vessel is covered both when laid up "and while in commission."

H. F. Smith construed the warranty as follows:

> "This indicates that the vessel is to be employed in general passenger and freighting business on Puget Sound during the life of the policy (p. 156); that the warranty touches the character of the employment (p. 158). I think they (vessel) would be held covered while laid up whether they notified the Company or not, if they did not require a return premium." p. 160.)

Mitchell Thompson testified (p. 163) that he construed the policy to mean that *"while she is employed,* she is to be employed in that particular trade and in those particular waters", and that in his opinion under the S. F. Hull Time Policy the

"vessel is covered while laid up—if the hazard is not increased by so doing." (p. 163.)

Capt. John Barneson testified (p. 169) that the warranty touches the character of the vessel's employment; that under the S. F. Hull Time Policy "a vessel is covered while laid up." (p. 173.)

Edgar Alexander testified (p 177) that the words "warranted employed, etc., touched the character of employment and the vessel would be covered while laid up".

J. J. Theobold construed the word "warranted" to be synonomous with "engaged". (p. 182.)

All the witnesses are agreed that the Vashon was covered while laid up; that the words "warranted employed" meant that while employed she must be employed in passenger and freighting business within a radius of 30 miles of Seattle.

The appellants are both members of the San Francisco Board (Testimony Levison, p. 196) and are charged with knowledge of the customs for which all these witnesses have vouched.

In *Hazzard vs. Insurance Co.,* 8 Pet. 557, 582, the court say:

> "The underwriters are presumed to know the usages of foreign ports to which insured

vessels are destined; also the usages of trade and the political conditions of foreign nations. Men who engage in this business are seldom ignorant of the risks they incur, and it is to their interest to make themselves acquainted with the usages of the different ports of their own country and also of foreign countries. This knowledge is closely connected with their ordinary business and by acting on the presumption that they possess it, no violence or injustice is done to their interests."

Mr. Alexander testified (p. 176) that the expression "warranted employed" was ambiguous.

Mr. Justice Story in *Livingston vs. Maryland Ins. Co.,* 7 Cranch 506, says:

> "If the expressions are ambiguous or such as the parties might fairly use without intending to authorize a particular conclusion, the insured ought not to be bound by the conjectures or calculations of probability of the underwriter."

Ins. Co. vs. Reed, 103 N. E. 77.

Stix vs. Ins. Co., 157 S. W. 870.

In *Oakland Home Insurance Company vs. Bank of Commerce,* 47 Neb. 717, the court say:

> "If the language were ambiguous in its grammatical signification, we would be compelled to adopt that construction which would be more favorable to the insured. Insurance policies are not contracts deliberated upon, clause by clause, and effected after detailed negotiations between insured and insurer. The

actual contract is for the most part entered into before the policy is delivered. The policy is proposed and tendered by the insurer on its own form. If it seeks to protect itself by a condition, it should clearly express that condition by the policy. If it resorts to ambiguous language, under familiar rules of construction, such language must be taken most strongly against the party proposing it and in favor of the other party."

Boyd vs. Thuringia Ins. Co., 25 Wash. 452.

The warranty accordingly touches the employment of the vessel and does not contemplate that unless she is constantly in operation she is not protected by the policy. She was laid up at a usual place in the tidal waters of a tributary of Elliott Bay. No return premium was demanded and she was fully covered while so laid up.

The Vashon was laid up in the Duwamish River, at a usual place for mooring such vessels and at a place where the tide rises and falls from eight to ten feet.

Testimony of Gibbs..... 35
Testimony of Walker..... 81
Testimony of Warner.....97
Testimony of Hamilton..... 62

She was securely moored by Capt. Warner, a master mariner of experience, who drove piling for the purpose.

Testimony of Warner, pp. 95, 96, 97, 98.

See place of mooring attached to affidavit of Warner, Exhibit 3.

Affidavit of Faber attached to exceptive allegations, Stip. p. 155, Exhibit 3.

The Duwamish River is a tributary of Elliott Bay. The Vashon was moored but a few hundred feet from the tide flats and within the limits of the City of Seattle.

We invite the court's attention to *Insurance Co. vs. Clarke & Co.,* 157 S. W. 291, decided May 2nd, 1913. In this case the policies covered the vessel *"only while used in the Gulf waters between Key West and the mouth of the Rio Grande River."* She sank in the Atchafalaya River at Morgan City, Louisiana, *eighteen miles from the open Gulf,* but where the tide *sometimes* ebbed and flowed. The court say:

> "Appellant contends that the words 'gulf waters' should be construed according to their plain, ordinary meaning, and that so construed gulf waters are waters of the gulf, and river waters are waters of the rivers, and that river waters become gulf waters when they have flowed down to and into the gulf, and conversely, gulf waters become river waters when by the action of the tides or winds they have flowed or have been blown into the rivers; that as long as water is in the river it is river water and as

> long as it is in the gulf it is gulf water, and that therefore the provisions of the policy which limited the tug to gulf waters of the United States means just gulf waters or waters of the gulf and not river waters or waters of the river."

The court holds that this contention is too narrow that the vessel was covered *while in the tidal waters of the river,* citing *Waring vs. Clarke,* 46 U. S. 441, in which the Supreme Court defines the "sea" to mean not alone "high seas" but the arms of the "sea", "waters flowing from it into ports and havens and as *high up rivers as the tide ebbs and flows."*

The court adds:

> "If such be the sea, certainly gulf waters may be construed to mean the waters as high up rivers as the tide ebbs and flows,"—

That waters within the ebb and flow of the tide are considered the sea is decided in *Gwin's Will,* 1 Tuck (N. Y.) 44, and *Cole vs. White,* 26 Wend 516.

The insured vessel was accordingly moored in a much more protected place than the open bay, where she would have been buffeted by winds, and was within the radius referred to in the policies.

WAS THE ABANDONMENT TIMELY.

Proctors for appellants will contend the question of abandonment by notice is not involved.

On exceptions to the libel and in the absence of proof Judge Hanford held that *prima facie* a notice given four months after the sinking of the Vashon was not timely. (173 Fed. 564, 566.)

"For cogent reasons," he said, "the insured party is required to act promptly in giving notice of abandonment, when it is intended to claim a constructive total loss, and without reasons justifying delay for the period which elapsed in this instance."

The testimony now shows conclusively these facts:

1. The vessel was raised, hauled out and cleaned, preparatory to survey as expeditiously as possible, appellee and the surveyors, including Capt. Gibbs, representing the underwriters, at all times urging the work.

2. That on account of the great expense she could not be put on a dry dock, but was hauled out by Sloan Brothers Shipbuilders, who were required to construct special ways for that purpose, and

after the ways were constructed, that firm experienced much difficulty in accomplishing the task.

3. That the vessel was thoroughly slimed with fuel oil and the surveyors could not safely enter her to complete a survey until April 15th, 1908.

4. That all this work progressed continuously, appellee and the representative of appellants concurring.

5. That notice of abandonment was given *immediately* on recepit of the surveyors' report, both by *wire* and by *mail.* (Exhibit 2, Exhibits L, M.)

The mere lapse of time is never conclusive. The law requires reasonable expedition.

To justify the owner in abandoning, he must wait until sufficient details are at hand to enable him to form an opinion as to the situation and to make up his mind as to the course he will elect to adopt. When this information has reached him, he must act without delay.

Templeman on Marine Insurance, p. 47.

In the recent case of *Watjen vs. Indemnity Mutual Marine Insurance Company,* ....., it was decided that the owners were entitled to recover as for a constructive total loss, notwith-

standing the fact that the notice of abandonment had not been given for five months after the vessel arrived in practically a state of wreck. The facts in the case were these:

The vessel was towed into Hall's Sound, New Guina, on May 14th, 1903, badly damaged by stress of weather. She was subsequently towed to Singapore, where she arrived on August 16th. The cargo was then discharged and the vessel placed in dry dock for survey; the result of the survey being that the surveyor estimated the cost of repairs at a sum exceeding her value. The owner first received information concerning the accident about July 20th, and toward the end of September he received a telegram informing him of the result of the survey. On October 12th, 1903, notice of abandonment was tendered and refused by the Underwriters.

If the contention made by respondent in the argument of exceptions is correct, it would have been incumbent upon the owner in the Watjen case to have tendered abandonment upon the arrival of the vessel at Hall's Sound, but the fact that he waited several months for the result of the survey at Singapore, then waited a further period of time after the receipt of that information, was not con-

sidered by the court as a waiver of his right to abandonment.

> "That notice of abandonment must be given with reasonable diligence after receipt of reliable information of a constructive total loss, but where the information is of a doubtful character, the insured is entitled to a reasonable time to make inquiry."

Owens Digest Marine Insurance, p. 76.

In the House of Lords, case of *Rankin vs. Potter,* Justice Blackburn in his reply to certain questions propounded by the Lords, says:

> "What would be a reasonable time and whether the neglect to give notice of abandonment does determine the election, must depend in each case on the circumstances, and principally on what steps the Underwriters might take if they had notice."

And his Lordship then quoted the following from *Phillips on Marine Insurance*:

> "But the better rule in such cases is that if the insured neglect to abandon, he shall recover only according to the state of things at the trial. Since, as we shall see, under a declaration of a total loss, he may recover for a partial loss and the Underwriters ought to have the advantage of whatever may occur to make the loss partial, so long as the assured delays to elect a total loss. If he had judgment for a total loss, this is equivalent to an abandonment, and gives the Underwriters a right to salvage."

As to the validity of abandonment, Arnould says on page 1233 of his work:

> "That to make a notice of abandonment valid, it must be justified by the state of facts existing at the time it was actually given."

In *Young vs. Union Ins. Co.,* 24 Fed. 279, the court says:

> "It is further urged that the insured is charged with unreasonable delay in giving notice of abandonment,—the disaster to the schooner having occurred in November and the notice of abandonment not having been given until the 7th of March following, but I do not see under the peculiar facts in this case, how this delay can have worked any injury to the insurer. And if it did not, it seems to me it should not in any way impair or effect the rights of the insured in the premises."

Again:

> "Inasmuch as at the time the notice of abandonment was given, there was still ample time for the respondent to have repaired the schooner, or sold her without repair for the next season's business,—it seems to me it does not lie in the insurer's mouth to object to the delay."

Munay vs. Ins. Co., 72 Hun. 282.

Gardner vs. Ins. Co., Fed Cs. 5225.

The insured has a reasonable time, depending upon the circumstances of each case, within which to give notice.

Hortin vs. Phoenix Ins. Co., 1 Wash. U. S. C. C. 400.

Reynolds vs. Ins. Co., 22 Pick. 191, 193, 199.

Ins. Co. vs. Stork, 6 Cranch 268.

8 *Fed. Cases,* No. 4136.

26 *Cyc.* 702.

In the instant case it is beyond dispute that it was not until April 15th, 1908, that a complete survey was possible. On that day the survey was completed by Captain Gibbs, representing the Board, and Captain Walker, representing the appellee. Their report is supplemented with the detail of necessary repairs, and it was then manifest that the cost of repairs would exceed the value of the vessel. All parties were made acquainted with this report, including appellants who then had the opportunity to either repair the Vashon or permit her to be sold. They declined to repair her and assented to her sale at $750.

Capt. Gibbs testified that he consulted with the agents of appellants, who wrote the policies,—"told them what we were doing"; that "they knew the survey was being made"; that "in negotiating a sale he was acting in the interest of all concerned"; that he kept the Board advised as to "just what was

going on"; "that there was an understanding between the owners and underwriters by which he was authorized to make the sale"; and that the vessel "was disposed of for $750, which was her reasonable value in her damaged condition."

Testimony of Gibbs, pp. 42, 43, 57

Testimony of Hamilton, pp. 76, 77

Why should appellants be heard to complain of delay? Assuming, for the sake of argument, that the work of raising, hauling out, opening up and cleansing the vessel to the end that the extent of damage could be ascertained, was not as expeditious as it might have been, how were the insurers adversely affected? They knew just what was being done; and only when the survey was completed April 15th, and they ascertained the loss was total, did they refuse to abide the terms of the policies. The vessel was covered to the extent of $15,000, Six thousand of which was promptly paid.

In *Livingston vs. Insurance Company,* 6 Cranch 274, it is expressly held that the right to abandon may be held in suspense by the mutual consent or conduct of the parties, and we submit in the light of the action of the surveyors of the Board of Underwriters that the whole question of abandon-

ment was held in suspense until the report of the survey was made.

> "Information to warrant an abandonment must be of such facts and circumstances as would sustain an abandonment, if existing in point of fact at the time the notice is given."
>
> *Gosley vs. Company,* 22 Am. Dec. 337.

> "The offer to abandon must be founded on information of facts sufficient to justify the abandonment."
>
> *Radcliff vs. Coster,* 1 Hoff. Ch. 98.

Independent of notice of abandonment, appellees were entitled to recover for the total loss of the vessel.

> "To constitute an actual total loss it is not necessary that there should be a physical destruction of the thing insured. It is enough that its value to the owner for the purpose for which it was created is destroyed."
>
> *Park on Insurance,* 155.
>
> 2 *Arnould on Insurance,* 1022.
>
> *Robinson vs. Ins. Co.,* 68 N. Y. 192.

The mere fact that an insured vessel exists in specie does not necessarily prevent the insured from claiming a total loss without abandonment.

> *McCall vs. Ins. Co.,* 66 N. Y. 505.

The insured may abandon in every case where the thing insured is so damaged as to be of little or no value to the owner.

Peele vs. Ins. Co., 3 Mason 27.

Nash on Ins., 482.

In *Bullard vs. Insurance Co.,* Fed. Cs. No. 2122, I Carter 148, Judge Curtis instructed the jury as follows:

> "An abandonment is necessary only in case of a constructive total loss. If the loss be actually total, the insured may recover for it without abandonment. It has been much discussed what constitutes a total loss, when the vessel remains in specie and still retains the form of a vessel, in a place of safety. I shall not trouble you with the different views which have been taken of this question, but I will state the rules which I deem proper for your guidance. It is manifest that the form of a vessel may remain and be in a place of safety, and yet, for all useful purposes, the vessel may have ceased to exist. If she be absolutely incapable of repair, so as to be fitten to encounter the seas, then she has ceased to exist as a vessel, though great part of her materials may remain and they may still be in the form of a vessel. So, though capable of being repaired and restored to the condition of a seagoing vessel, yet, if this can only be done at an expense exceeding the value of the vessel when repaired, it is an expense which no one is bound to incur, and therefore the case is the same as if absolutely irreparable; there being no practical difference, for this purpose, between what cannot be done

> at all and what no prudent person would undertake to do. And, therefore, if you should find from the evidence in this case that the injuries suffered by this brig from perils of the sea were so great that they could not be repaired so as to make her a seaworthy vessel, except at an expense exceeding her value when repaired, then this was a case of actual total loss, and no abandonment was necessary."

This court in *Soelberg vs. Ins. Co.,* 119 Fed. 27, recognize the rule "that the mere fact that an insured vessel exists in specie does not necessarily prevent the insured from claiming a total loss without abandonment", stating that "Every case depends upon its own peculiar facts and upon the terms and provisions of the particular policy of insurance in question".

Immediately after the surveyors made their report they solicited bids for the repair of the Vashon. Two bids were received, that of Hall Bros., work to be completed in sixty days, $23,500; and that of Heffernan, work to be completed in *four months,* $14,027.

Now at that time expenses had been incurred in raising and hauling out and cleaning the boat, amounting to nearly $4000. So that the vessel was an actual total loss, and notice of abandonment was not required.

26 *Cyc.* 685 and cases.

Harvey vs. Ins. Co., 79 N. W. 898, 900.

Reynolds vs. Ins. Co., 22 Pick. 191, 193.

PARTIAL LOSS.

What we have just pointed out to the court fully answers appellants' claim that the loss was not an actual total loss and that recovery was limited to partial loss.

Proctors for appellants will contend that the sound value of the vessel was $15,000; that in her damaged condition she sold for $750; that the depreciation would thus be $14,250; that the lowest bid for repairs was $14,027.00 and that therefore the loss was not an actual total loss. But if we assume that the vessel could be repaired for even $14,027, the cost then incurred of $3,964.80 (testimony Hamilton 20) must be added, making the total cost of putting the vessel in sound condition of $17,991.80, or $2,991.80 more than her sound value.

Harvey vs. Ins. Co., supra.

Reynolds vs. Ins. Co., supra.

Appellants offered no proof to controvert any statement or estimate contained in the survey. There is no pretense of a claim that the price obtained for the vessel in her damaged condition was inadequate; there is no evidence that any delay which necessarily ensued in raising and hauling out the vessel resulted in any disadvantage to appellants. There exists no legal reason why the losses under these policies should not be paid.

After preparing the foregoing brief we received copy of appellant's brief. The question of jurisdiction was not presented to the trial court.

This action is based on two, time policies of marine insurance. The contract is accordingly maritime and "The admiralty will proceed to inquire into all its breaches and the damage suffered thereby, however peculiar they may be and whatever issue is involved."

Church vs. Shelton, 2 Curt. 271-274.

DeLovio vs. Boit, Fed. Cas. 3776.

Graham vs. O. R. & N. Co., 134 Fed. 464.

The attempt of the appellant to raise the question of jurisdiction in the light of the doctrine in

the *Dunham* case is highly technical. In that case it is held "The true criterion is the nature and subject-matter of the contract, as to whether it was a maritime contract, having reference to maritime services of maritime transactions". After reviewing the decisions the Supreme Court say:

> "It thus appears that in each case the decision of the court and the reasoning on which it was founded, have been based upon the fundamental inquiry whether the contract was or was not a maritime contract. If it was, the jurisdiction was asserted; if it was not, the jurisdiction was denied. And whether maritime or not maritime depends not on the place where the contract was made, but on the subject matter of the contract. If that was maritime, the contract was maritime. This may be regarded as the established doctrine of the court."

Again the court say:

> "It only remains then to inquire whether the contract of marine insurance, as set forth in the present case, is or is not a maritime contract."

The court answers this inquiry in the affirmative.

The cases cited by appellant are not in point. This is not an action by a "watchman"; nor on a "contract of storage"; nor on a "fire policy" on a vessel used as a "hospital". The Vashon had not been "withdrawn from commerce", but was in all

respects a fully equipped steam vessel temporarily laid up until her summer run should be resumed. The policies are time policies, and the witnesses all agreed that they covered the vessel while laid up, no return premium being demanded. The contract remains the same as when written. The risks covered were identical. The mere laying up of the vessel did not change the maritime character of the contract. This court will examine the record in vain for the slightest evidence to sustain any claim that the insured vessel had been "withdrawn from commerce". Her field of operation had been temporarily closed.

This court in *Ried vs. Weule,* 176 Fed. 660, held that "a contract of sale of a chronometer as appertaining to a particular vessel is a maritime contract within the jurisdiction of admiralty, though at the time of sale it was on shore". The reasoning upon which that case was based was that the chronometer being necessary to the vessel and having been sold as appertaining to her, made the contract maritime.

The marine insurance in the instant case was taken out upon the steamer Vashon. The policies run for one year. The vessel was laid up in the tidal waters at the mouth of the Duwamish River.

The testimony shows that the vessel was covered by these marine policies while thus laid up, no demand for return premiums having been made. The insurance contract appertained to the vessel, just as much as the chronometer, and the mere laying up or mooring of the vessel could not change the character of the contract, provided she was covered while thus laid up.

Appellant contends that the words written into a time policy: "Warranted employed" mean, "Warranted employed *continuously* in general freighting and passenger business," for a period of one year.

The trial court held that those words properly construed, mean that the vessel, at the time the policy was applied for and issued, was so employed.

In *St. Nicholas Company vs. Merchants Insurance Company,* 11 Hun. 108, the policy by its terms purported to cover the vessel "while running on the Hudson and East Rivers", but the court held that such provision does not restrict the insurance to the time the vessel was in motion.

The policies were issued by the agents of the several respondents in Seattle and became operative only upon being signed and delivered by those

agents. They knew that this vessel was plying in the freight and passenger business between Alki Point, a summer resort, and Seattle. These agents knew that when these policies were issued she was engaged on a summer schedule.

Counsel indulges in many refinements and definitions which, standing alone, mean nothing. I use the phrase "John Doe is employed by me". By no possible implication can this language be distorted into an employment for a definite or indefinite time, or into language importing that I shall "keep him at work", or "keep him busy". The language simply imports that at that time John Doe is in my employ.

The word "warranted" adds nothing to the phrase employed in the policy. It would mean the same thing if it read: "Vessel employed or engaged in freighting and passenger business between Alki Point and Seattle".

If the insurance company had desired to provide that the vessel insured by it, must, under its time policy, be *continuously* engaged in actual operation in order to be covered, the policy should have so declared in unambiguous language. These insurance companies prepared these policies; libelant did not. If ambiguous, and respondent's witness Alexander

testified that they were, the insurance companies are to blame. They did not need to leave anything to be inferred. If their contention here is true every vessel covered by one of their policies is not protected while in dry dock, or while laid up for repairs, or while temporarily moored. If their contention is true the insured would not know when he was or was not covered.

Ins. Co. vs. Bank, 47 Neb. 717, *supra.*

Counsel say that "employed" implies a continuing state or condition. No, it implies an existing state or condition, having regard solely to the date when the policy became effective.

Appellant's counsel makes the sweeping statement that certain witnesses testified that the meaning of the words "warranted employed" etc., meant that the vessel "will be empolyed as indicated during the life of the policy".

The court will examine the testimony of these witnesses in vain for any such statement.

J. B. Levison testified:

> "Q. By that you mean that *when employed* the vessel must be employed in that way?
>
> A. I should say so, Mr. Campbell, of course it is quite usual for vessels to be unemployed at certain times."

Mr. Pinkham testified that

> "My understanding is that the vessel is warranted to be employed on Puget Sound during the life of this policy exclusively" (Rec. 153); that "the San Francisco policy will cover a vessel at all times whether laid up or in commission" (Rec. 154).

Mr. Smith after testifying that the underwriters would always prefer that all insured vessels should be laid up on account of risk, says (Rec. 161):

> "I think they would be held covered while laid up, whether they notified the company or not, if they did not require a return premium."

Thompson testified to the same facts (Rec. 164-5) and added that the vessel would be covered while laid up in "safe tributary to Puget Sound".

Captain Barneson testified that the language used touches the "character of her employment"; that the vessel would be covered under the policy while laid up in Puget Sound within thirty miles of Seattle and "tributary waters".

> "Q. If it is customary to take vessels into those parts of the tide flats which are navigable, you would consider that your vessel was within the waters described here would you not?
>
> A. Yes, sir, I would consider she was within those waters, if they were navigable waters (Rec. 172).
>
> Q. It is customary in the insurance trade to hold a vessel covered while laid up under a yearly policy, is it not?

A. Yes, sir, that is my experience. The warranty touches the character of the employment. It is special" (p. 29).

Q. If you are at that point where the waters of the river flow into a tributary of Puget Sound, say Elliott Bay, you would not consider you were beyond those waters?

A. I would consider that you are beyond the waters of Puget Sound *just as soon as you went beyond the rise and fall of the tide, outside of the salt water"* (Rec. 174).

Alexander testified (Rec. 176) that the use of the word "employed" without the additional words "to be", "is merely a *grammatical error to which many people are subject in expressing themselves".*

From the testimony of these witnesses, these conclusions are inevitable:

1st: That the words "warranted employed in freighting, etc.," simply "restrict the vessel while being operated to the waters described in the policies, and in this case to the waters within a radius of thirty miles of Seattle".

2nd: That the insured vessel is not required under this language to be kept in constant operation during the life of the policy, but no return premium being demanded, may be laid up within thirty miles of Seattle in Puget Sound or tributaries

within the ebb and flow of the tide, if the place selected is a usual and customary one.

3rd: That there is no basis whatever for appellant's claim that these witnesses testify that: The vessel *will be* employed as indicated *during the life of the policy.*

We accordingly insist that the trial court's interpretation of the contract is absolutely correct. We were not responsible for the "grammatical error" referred to by Alexander. These covenants, as suggested by Judge Hanford, are always construed favorably to the assured. We had a right to assume there was no grammatical error and that the words simply implied that the vessel was, when the policies were issued, employed in freighting, etc. That such is a correct construction of the language is also irresistible in the light of the conceded facts that the words "employed, etc., within a radius of thirty miles of Seattle" had reference to the place of her employment under the policy during its life.

This defense is likewise purely technical and of no avail.

It is next contended that if the words "warranted employed, etc.," meant that the vessel must be continuously employed, were the policies breached by her laying in the tidal waters of the Duwamish River?

The Vashon was laid up for the winter near the mouth of the Duwamish River and at a usual place for that purpose. She was laid up by a competent navigator and moored with extreme care.

See evidence of Warner and diagram attached to affidavit of Warner.

Was the Duwamish River at a place where there was a ten foot rise and fall of the tide a tributary of Puget Sound? The insured vessel was permitted to use the navigable waters of Puget Sound within a radius of thirty miles of Seattle.

In *The Orient,* 16 Fed., which was affirmed by the Supreme Court, it was held that a policy permitting a vessel to navigate the Atlantic Ocean between Europe and America, was covered while in the Gulf of Mexico.

Witnesses agree that the Vashon could be laid up within a radius of thirty miles of Seattle and she would be covered. That she could have been moored at the head of Elliott Bay, where she would

have been buffeted by gales cannot be disputed. She was moored in thirty feet of water in the tidal waters near the mouth of Duwamish River, at a usual protected mooring and within the city limits of Seattle.

Counsel cites the *Hastorf* case, 132 Fed. The policy provided, "Warranted by the assured *to be* employed *exclusively* in the freighting business and to navigate only the waters of the Bay and Harbor of New York, the North and East Rivers and the inland waters of New Jersey".

The vessel was removed from the *restricted* zone of permitted operations and moored,—not in North or East Rivers, but in Rondant Creek a tributary of the Hudson, where by the very terms of the policy she had no right to be laid up.

In *Miller vs. Insurance Company,* 12 W. Va. 116, 29 Am. Rep. 452, the policy gave the insured permission to navigate the Mississippi River and tributaries, except the Missouri and Arkansas Rivers. The insured vessel was lost in a tributary of the Red River, which was a tributary of the Mississippi, and the court held the policy covered the loss.

A tributary is a body of water which runs or empties into a larger body of water. Elliott Bay

is tributary to Puget Sound. The same tide that would float the Vashon in safety off the end of Harbor Island, would enable her to float and navigate at the place where she was moored.

Appellant's witnesses say the vessel could be laid up under the policy in a tributary of Puget Sound at a usual and cusotmary place; and had the vessel been anchored in the open Bay off Harbor Island in the winter season and there lost, these Insurance Companies would be now contending they were not liable for the reason that such place was neither "usual" nor safe.

In the *Pearson* case a vessel was insured while lying in the Victoria Docks, which was protected against loss by fire by adequate appliances, with leave to go into dry dock. She went into dry dock, but instead of returning to Victoria Dock where there was adequate fire protection, she anchored in the Thames and was burned.

The question of partial loss, we insist, is not involved in this case. At the time the Vashon was hauled out, cleaned and inspected, expenses had been incurred amounting to the sum of $3,964.80.

The bids submitted for the repair of the vessel were respectively $14,027.00, time required four months, and $23,500.00, time required sixty days. The vessel was sold, after due notice to all parties, for $750.00. Any amount recieved from the sale of the vessel would be properly applied, first, to the payment of the expenses incurred by the surveyors in raising, hauling out, cleaning and surveying the vessel. And after applying the purchase price, there would have been left an indebtedness in excess of $3,000. Further than that, in order to secure a premise on which to base an argument for partial loss, proctor for appellant has taken the proposal for the repair of the vessel, which would require four months' time within which to complete the work, during which time the vessel would necessarily remain in a condition to be of no value to the appellee.

We respectfully submit that the decree of the trial court should be in all respects by this court affirmed.

KERR & McCORD,
IRA A. CAMPBELL,
Proctors for Appellees.